
Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

DATE: DECEMBER 3, 1997
CASE NO.: 93-ERA-47

IN THE MATTER OF

A. D. PAYNES,
Complainant,

against

GULF STATES UTILITIES COMPANY,
Respondent.

APPEARANCES:

STEVEN IRVING
1528 Del Plaza, Suite C
Baton Rouge, LA 70815

For the Complainant

ROBERT M. RADER,
JOAN B. TUCKER FIFE
Winston and Strawn
1400 L. Street, N.W.
Washington, D.C. 20005-3502
For the Respondent.

BEFORE: RICHARD D. MILLS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter the "Act" or "ERA"), and the implementing Regulations found in 29 C.F.R. Part 24, whereby employees of licensees or

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applicants for a license of the Nuclear Regulatory Commission and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. This complaint was filed by A.D. Payne (hereinafter "Complainant") against Gulf States Utilities Company (hereinafter "Respondent"). The matter was referred to the Office of Administrative Law Judges for a hearing and a Recommended Decision and Order. Pursuant thereto a formal hearing was held on December 13 and 14, 1993, and February 4, 1994, in Baton Rouge, Louisiana. Both parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. Post hearing briefs were received from Complainant and Respondent.

BACKGROUND

Complainant has brought this action as a result of his demotion from Radiation Protection Technician to tool room attendant. Complainant alleges that he was demoted for engaging in protected activity. Specifically, Complainant alleges that his demotion was a result of his internal safety report documenting the misplacement of a ladder in a high radiation area. Respondents assert that Complainant's demotion was a result of continued poor performance. Complainant also asserts that, in regard to the incidents cited by Respondent as justification for his transfer, he was "set up" in those incidents.

FINDINGS OF FACT

1. Complainant has been employed by Respondent since September of 1981. At time of hearing, he had been working at the River Bend Station for five years. When Complainant started working for Respondent, he was a lineman helper, a job that involved mainly "grunt work." Complainant, as a result of the job opportunity program with Respondent's, began working in the Radiation Protection Department at the River Bend facility. (Tr. pp. 20-21).
2. At the time Complainant worked in the Line Department as a lineman helper, he received a disciplinary suspension for four days after an argument with the lead lineman. According to Complainant, he had asked to stop at the store for cough drops, which was allegedly allowed by the lead lineman. However, the lead lineman later told the supervisor that he had not given permission for Complainant to stop at the store, and Complainant was subsequently laid off for four days. Complainant did not file a grievance with the union. (Tr. pp. 21-23).
3. Complainant's position at the River Bend facility was originally that of Radiation Protection Helper. Complainant went through four to six months of Training with additional on-the-job training. His duties included working with other technicians and assisting them. (Tr. pp. 24-25).

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4. There are several levels of radiation protection technician starting with helper, then third class, second class, and finally first class. At the second and first class levels, the technician is allowed to provide job coverage which means that the technician will inspect the work-site, equipment, and workers in order to prevent the workers from being exposed to harmful radiation. (Tr. pp. 25-26).

5. Complainant became a third class technician one year after becoming a helper. According to Complainant, in order to move up a class, a person needs to achieve his qualification cards in which a foreman will certify that the technician is competent in the applicable areas. Complainant stated that a helper must have worked as a helper for one year in order to move up a class. (Tr. pp. 27-28).

6. Complainant eventually made it to first class radiation protection technician by increasing in class one year at a time. In order to qualify for first class, Complainant stated that a person had to know everything that a second class technician knew, plus that person had to attain more qualification cards. Complainant became a first class in September of 1992. (Tr. pp. 29-31).

7. Complainant stated that on September 30, 1992, he was working at the access control desk where he was accessing workers throughout the plant. To do this, Complainant would tell the workers the radiation dose rates and the possible hazards in the areas they were going to work in. Complainant stated that on that day he received a phone call from Radiation Technician first class Mark Pendergraft, who was working in the radiation waste building. According to Complainant, Mr. Pendergraft called him and asked him if he had accessed anyone into the radiation waste building because there was a ladder that was erected in the radiation waste building against the liner wall. Complainant stated that he answered "no." (Tr. pp. 31-32).

8. Complainant testified that Mr. Pendergraft called him back later and told Complainant that the dose rates at the top of the ladder were in excess of 100 millirem ("mR") an hour. Complainant stated that Mr. Pendergraft asked him if he wanted him to write up an "RDR" (radiological deficiency report) or whether he'd like to do it himself. Complainant stated that he told Mr. Pendergraft he would contact radiation protection foreman Dan Heath about the situation. Complainant testified that he then told Mr. Heath that "we've got a situation in rad waste where there's a ladder up against the wall and I think an RDR needs to be written on it." According to Complainant, Mr. Heath grew angry and said that an RDR did not need to be written. Complainant stated that Mr. Heath then talked directly to Mr. Pendergraft over the phone, whom he told to take the ladder down. Complainant stated that he then argued with Mr. Heath about writing up an RDR, and finally, at Complainant's insistence, Mr. Heath agreed to let Complainant write up an RDR. (Tr. pp. 32-34).

9. Complainant described a high radiation area as an area that has to be guarded in such a way that someone has to cross a physical barrier in order to access the area. Those persons have to have a

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radiation instrument or they would have to have some type of "RP" (radiation protection) coverage in order to access the area. Complainant stated that the situation was that the ladder was erected and it was laying up against the wall and on top of the wall was posted a very high radiation area. Complainant explained that the presence of the ladder made a very high radiation area accessible. (Tr. pp. 34-36).

10. Complainant filled out the RDR report. Complainant only filled out the top of the report and added an attachment. (Tr. p. 37).

11. The part of the RDR report written by Complainant states that a radiation protection technician "was surveying the RW 106 and notice[d] a ladder leading up to the RW liner bay. He climb[ed] up the ladder to investigate and found some dose rates around 100 mR/Hr." The second part of the RDR was written by Mr. Daniel Heath, the foreman. Mr. Heath wrote that immediate action was taken to remove the ladder. He also stated that the ladder was used on 9-29-92 at 1300 to allow the latching of a crane hook to the liner to check the serial number of the liner and then also to allow the unlatching of the liner. Mr. Heath stated that the ladder was inadvertently left in that position. (CX-1).

12. Attachments to the RDR stated that the ladder was not used to access the liner bay wall, by was utilized to operate a "J" hook from outside the liner bay. The attachment stated that a survey conducted by the R.W. R.P. technician after the ladder was installed indicated 15 mR/Hr where the individual was standing on the ladder. The attachment also stated that the root cause of this event was the failure to remove the step ladder from the truck bay after completion of the evolution. (CX-1).

13. Concerning "RDR's" or radiological deficiency reports, they are reports which are written out before a "CR" or condition report. The RDR is generated so that management can get a firsthand look at the situation and see whether or not it warranted a CR. Complainant stated that the facility was generating a lot of CR's, but that the ladder incident never made it to a CR, as it was just a violation. Complainant stated that a lot of RDR's were written up for contamination during the six month outage. Complainant stated that anybody can write an RDR or a CR. Complainant testified that he had written plenty of RDR's, most of them dealing with contamination. (Tr. pp. 121-122).

14. Complainant stated that shortly after the ladder incident there was a Nuclear Regulatory Commission (NRC) inspection. Complainant stated that the RDR and the ladder incident that it documented became a violation in the inspection. (Tr. p. 38).

15. Complainant testified that before this particular ladder incident, there was another ladder incident where Complainant had raised a safety concern about a ladder. This incident involved a CR. According to Complainant, the CR was canceled. Complainant, to the best of his knowledge, was not subjected to any adverse action because of his safety concerns about this ladder, even though Complainant had disagreed with the CR being canceled. (Tr. pp. 127-128).

16. Complainant testified that on October 1, 1992, he received a phone call from Mark Pendergraft from the radiation waste building in which Mr. Pendergraft told him that he had found a waste bag out there with Complainant's tag on it and that the bag was very hot with about 14,000 millirems of gamma radiation. Complainant stated that he told Mr. Pendergraft that he didn't think he could have missed such a highly radioactive dose rate and written out the wrong tag for it. (Tr. pp. 38-39).

17. Complainant stated that on October 2, 1992, he was called in by his supervisor, Mr. Wayne Hardy. Complainant stated that he was shown the tag from the bag, bearing his name and a date of September 4, 1992. Complainant stated that at this time he was not shown the actual bag nor was shown photographs of the bag. (Tr. pp. 39-41).

18. According to Complainant, he first told Mr. Hardy that he did not even remember going in the room that the bag came from. Complainant recalled that in a later meeting with Mr. John Anderson, he told Mr. Anderson that he had went in the room but there was no way he could have mistakenly tagged the bag at a lower dosage. (Tr. pp. 97-98).

19. According to Complainant, when he did view the photographs of the bag, he stated that it was not the bag that he had tagged and surveyed on the day in question because the tag had just been slapped on the bag and was not the same color of the bag that he had surveyed. (Tr. pp. 43-44).

20. Complainant stated that on the day of the tagging, he was in charge of cleaning up the refuel floor and was given an addition order to into the reactor building and pull out the trash and the "PC's" (protective clothing). Complainant stated that during the job, he checked the dose rates which he found to be less than two millirems per hour. Complainant testified that he and two workers gathered the trash and taped the bag up. (Tr. pp. 46-50).

21. Complainant testified that he had sat down and leaned against the bag while having a conversation with some of his co-workers. (Tr. p. 107).

22. According to Complainant, the bag that was used at the time was clear. Complainant stated that clear bags are used for trash, clear bags with a yellow strip on them are used for trash and measuring and testing equipment, and the yellow bags are used for PC's. Complainant stated that when the job was done, there were two yellow bags and one clear bag of trash. (Tr. pp. 50-52).

23. Complainant stated that at the time he was tagging the bag, the facility was at the end of a six month outage. Complainant stated that during the outage, he had surveyed and tagged a substantial amount of bags. (Tr. p. 93).

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24. Complainant stated that on the date in question, September 4, 1992, none of the instruments he was carrying indicated that he had gotten any unusual radiation. Complainant asserted that the same was true of the two workers who were with him. (Tr. p. 57).

25. Complainant stated that he was suspended for three days for the 14 R bag incident. Complainant believes that he was "set up" in this incident. The reasons for his suspension were that he had tagged the trash bag improperly, had not

signed his radiation meter out, and had released a sling out of the protected area that was contaminated. (Tr. p. 60).

26. Complainant testified that he was aware that some of his actions resulted in Respondent being fined $100,000.00 by the NRC. These actions were related to the bag incident. Complainant also admitted that he had made some of the mistakes which were cited by the NRC in imposing the fine. Complainant admitted that he knew he was supposed to have signed out the meter used to test the bags, but he did not do so. (Tr. p. 136). Complainant admitted that he had also went into a high radiation area without being on an "RWP" (Radiation Work Permit). Complainant also admitted that he had not documented the bags on a survey sheet because he "completely forgot about the job and the job just didn't even register." (Tr. pp. 135-137).

27. Complainant was also cited by Respondent for releasing a contaminated sling out of the protected area. Concerning the releasing of the sling, Complainant stated that he was called into an office by a supervisor who asked Complainant if he had released a sling out. According to Complainant, he stated that he had released a sling out to a worker on one day, but then on the next day another worker brought up two slings, one of which was contaminated. Complainant stated that he was blamed for the contaminated sling. (Tr. p. 61).

28. Complainant testified that there was another incident of note concerning a radioactive source in an instrument being used for an instrument response test. On the day of the incident, Complainant stated that he signed three radioactive sources out, took them out of the source locker, and then proceeded to the two locations where he performed the instrument response tests. According to Complainant, after completing the tests, he was not qualified to release the sources back to the source room. He thus called Mr. Charles Herndon, who was the lead technician, to come watch him survey the sources and then cosign for him. Complainant stated that this process took place and Mr. Herndon cosigned the documentation and took the sources to put them back in the source locker. (Tr. p. 65).

29. Complainant testified that he was alleged to have left one of the sources in one of the instruments at the fuel building. Complainant stated that the fuel building was the first place he had went to and that he would have needed the sources to run the tests in the services building. According to Complainant, the last time he saw the sources was when he turned them over to Mr. Herndon. Complainant stated that Mr. Herndon had not signed the sources back in for him like he had asked him to do. (Tr. p. 67).

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30. Complainant stated that he was not given a disciplinary layoff or reassignment but was told that the matter was being further investigated as well as another matter where it was alleged that Complainant had not signed his meter back in. Concerning this, Complainant stated that he had been very careful for signing the meter out but that he could not sign the instrument back in because he could not release the instrument from the radiologically controlled area. Complainant stated that he was told by Jim Onorato, a lead technician, that he was to leave the

instrument out there and that the first available qualified person would release the instrument and sign it back in. (Tr. pp. 67-68).

31. According to Complainant, he was later suspended for eight days and then he was reassigned to the tool room as a tool room attendant. Complainant's rate of pay changed also, from $17 per hour to $12.64 per hour. (Tr. p. 72).

32. Respondent keeps a record of cumulative radiation doses of employees. Complainant explained that the record is an accurate account of a worker's exposure to radiation. Complainant stated that he was not assigned a radiation dose in connection with the alleged tagging of the 14,000 mR bag, although the two workers he had been working with were both assessed at 354 mR's. Complainant testified that he inquired as to why he had not received a dose rating but has not received an answer. (Tr. pp. 74-76).

33. Complainant recalled that there were some performance problems regarding his documentation in that he would only partially fill out some of his documentation. According to Complainant, he was told that he needed to pay attention to detail. (Tr. p. 129).

34. Complainant stated that he received a reprimand for having a television in the "RCA." Complainant recalled that he also received a reprimand for drawing a picture of a barroom scene during one of his breaks at work. The picture depicted a group of people including one of the foremens'"s wives who had put her bra on her husband's head, who was then dancing around with the bra on his head. Another employee was depicted with his pants down. According to Complainant, the picture depicted an actual event and did not contain any nudity. Complainant stated that he had not completed the picture and that he had the picture in his drawer. Complainant stated that he had not shown the picture to anyone. (Tr. pp. 133-135, 151).

35. Complainant stated that the picture was discovered when some co-employee's went through his drawer, without Complainant's permission. Complainant was approached by his co-employee's and a dispute followed. The union steward was called. (Tr. p. 136).

36. Complainant testified that he filed grievances with the union for his suspensions but the union did not pursue the grievances allegedly because there was not enough evidence to support Complainant's side of the story. (Tr. p. 138).

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37. Mr. Mark Pendergraft testified in this matter. At time of hearing, Mr. Pendergraft was employed by Respondent as a first class radiation protection technician. (Tr. pp. 153-154).

38. Concerning the ladder incident on September 30, 1992, Mr. Pendergraft recalled that on that particular day he was working as the radiation waste technician when he came across the ladder. Mr. Pendergraft stated that he felt the ladder should not have been there and he called the foreman's office and talked to Mr. Jeff Goudeau, who referred Mr. Pendergraft to Mr. Dan Heath. Mr. Pendergraft testified that he then was informed that Mr. Heath was not in his office, so he was told to call the lead technician's desk to ask them if anyone had been accessed in that area where the ladder was. Mr. Pendergraft stated that he

could not recall who the lead technician was that day. According to Mr. Pendergraft, when he called the lead technician office, no one answered and the call was transferred to access control, where Complainant was working. Complainant answered the phone and Mr. Pendergraft asked him if anyone had been accessed into the area in question. Mr. Pendergraft stated that he had not mentioned the ladder at the time. (Tr. pp. 155-158).

39. Mr. Pendergraft stated that shortly after, he received a page from Mr. Dan Heath who told him to take the ladder down. Mr. Pendergraft believed that Mr. Heath had heard about the ladder from Mr. Goudeau. Mr. Pendergraft stated that he had returned to the office and met Mr. Heath at access control. According to Mr. Pendergraft, Mr. Heath had talked to Mr. Jim Spratley who was the radiation waste building foreman and had been assured that the problem would not occur again. Mr. Pendergraft recalled that Complainant had felt that there was radiological concerns with the ladder and had wanted to write up a RDR. Mr. Pendergraft stated that Mr. Heath and Complainant got into a heated argument over the subject with the end result being that Complainant wrote up the RDR. (Tr. pp. 158-160).

40. Mr. Pendergraft was aware that the RDR about the ladder ended up as one of the violations cited by the NRC when the $100,000.00 fine was imposed. (Tr. p. 160)

41. Mr. Pendergraft stated that he has written several RDR's and had considered writing one for the ladder incident but was satisfied with the way things were handled and decided that the need did not exist to write one. (Tr. p. 175).

42. According to Mr. Pendergraft, on October 1, 1992, he came across the "14 R" bag that beared Complainant's tag. The bag was discovered because Mr. Pendergraft and two radiation waste workers each picked up radiation readings on themselves when they knew that they should not have picked up any or very little dosage. This resulted in a search of the floor. During the search, high dose rates led them to a large metal box which contained the bag in question. According to Mr. Pendergraft, the bag was a large plastic bag stuffed full of material bearing a tag signed by Complainant that stated that there was less than two millirem per hour of radiation coming from the bag. Mr. Pendergraft stated that the tag was on the inner bag and that the outer bag did not have a tag on it. Mr. Pendergraft stated that the inner bag was yellow. (Tr. pp. 161-163).

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43.Mr. Pendergraft stated that the tag was affixed to the bag by means of yellow duct tape wrapped around the bag and the string of the tag. According to Mr. Pendergraft, this was the usual way to affix a tag. (Tr. p. 167).

44. Mr. Pendergraft testified that as a result of the bag incident, the NRC came on-site and conducted an investigation. (Tr. p. 169).

45. Concerning the picture drawn by Complainant, Mr. Pendergraft stated that he saw the picture, saw himself portrayed in the picture, and found the picture to be both humorous and accurate. (Tr. p. 168).

46. Mr. William H. Powell testified in this matter. Mr. Powell, at time of hearing was employed by Respondents as a first class Radiation Protection Technician.

During September of 1992, Mr. Powell was providing coverage for the radiation waste operations group. Mr. Powell was responsible for overseeing the workers who processed the waste and prepared it for shipping. Mr. Powell testified that during the outage, there were problems regarding the large volume of trash they were receiving. (Tr. pp. 184-186).

47. Mr. Powell stated that he was not present when the 14 R bag was discovered. During the ensuing investigation, Mr. Powell was asked to take dose rates of the bag. Mr. Powell stated that the opinion of the investigators was that the bag had come over on a "farm wagon." Mr. Powell disagreed with this assertion because he had done a cursory radiation survey over the wagon when it arrived to make sure that there was not an unposted high radiation area. Mr. Powell stated that the bags on the wagon were all single bags when they arrived where as the 14 R bag in question had two outer bags. (Tr. pp. 187-193).

48. Mr. Powell stated that the farm wagon was unloaded by the decon staff. These staff were wearing alarming dosimeters which are instruments that read radiation and goes into alarm when a certain amount of radiation has been detected. Mr. Powell testified that any personnel moving the 14 R bag in question would have had their dosimeters alarm. (Tr. pp. 194-195). Mr. Powell concluded that the bag did not come over on the farm wagon but rather came over with some of the other volumes of waste that were brought into the building. (Tr. pp. 197-198).

49. Mr. Clifton McQuirter testified in this matter. Mr. McQuirter, at time of hearing, was employed by Wood, Ferris and Eckerd, which is a contract company to Respondents, as a decon technician. A decon technician's job is to decontaminate plant equipment, tools, and areas in the plant. (Tr. p. 209).

50. Mr. McQuirter stated that on September 4, 1992, he was assigned with another decon technician, Mr. Eric Jones, to go to the reactor building and decontaminates the 186 elevation of the reactor building. During that job, he was accompanied by Complainant. After finishing with the 186 elevation, they were told to go to the 131 level of the reactor building and pull the trash and PC's there. (Tr. pp. 209-210).

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51. Mr. McQuirter testified that the protective clothing (PC's) were gathered into a bag and then that bag was put into another bag. The bags for the PC's were yellow. Mr. McQuirter stated that the bags for the trash were clear with a yellow magenta border. Mr. McQuirter stated that three bags were pulled out and all three bags had tags on them. (Tr. pp. 211-213).

52. The bags were taped utilizing what is called a "J-seal" method, where the bag is compressed to remove all excess air from it, then it is twisted and the top portion of the bag is taped down, and then it is folded over and taped again to make the J-seal. (Tr. pp. 213-214).

53. Mr. McQuirter stated that on September 4, 1992, his dosimeter turned in a zero for dosage received. (Tr. p. 217). Mr. McQuirter stated that he didn't feel like the 14 R bag was the bag they carried because they passed by Armory 14 which had three personal monitors and nothing registered. Mr. McQuirter stated that he also did not have any dosage register on his pocket dosimeter. (Tr. p. 219).

54. Mr. Joe R. Porter testified in this matter. Mr. Porter, at time of hearing, was employed by Respondents as a Radiation Protection Technician second class. (Tr. p. 245).
55. Mr. Porter stated that his connection to the 14 R bag incident was that he had surveyed a load of trash that was going over to the radiation waste building that had been stored in the fuel building. Mr. Porter stated that he had been told by Respondents that they thought that the 14 R bag had been on the wagon as it went around. Mr. Porter stated that he had told Respondents that he didn't think the bag had been on the wagon that he had surveyed and loaded. Mr. Porter testified that he had done cursory surveys of most of the trash bags and had surveyed the wagon when it had been loaded, finding a dosage of 6 mR. (Tr. pp. 247-248).
56. Concerning RDR's, Mr. Porter stated that it was not frowned upon to write an RDR. Mr. Porter felt that in the past, there wasn't as much encouragement to write them but that since the 14 R bag incident, there is much more of an emphasis on finding problems and correcting them immediately. (Tr. pp. 250-251).
57. Mr. Archie M. Rabb testified in this matter. Mr. Rabb, at time of hearing, was employed by Respondents as a Radiation Protection Technician second class. (Tr. p. 254).
58. Mr. Rabb testified that on September 9, 1992, he was escorting the farm wagon from the fuel building to the rad waste building. During that time, Mr. Rabb conducted a survey around the perimeter of the trailer to make sure the dose rates were at a level previously reported. Mr. Rabb testified that he was informed by Mr. Porter what the dose rates were prior to the wagon coming out of the fuel building. Mr. Rabb stated that in conducting his survey, he did not find any unusual dose rates.

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59. Mr. Ronald W. Edgens testified in this matter. At time of hearing, Mr. Edgens was employed by Respondent as a Repairman first class. Mr. Edgens stated that the 14 R bag contained packing that was pulled out of a valve. Mr. Edgens was of the opinion that the 14 R bag packing did not come from valve B33MOV23A, which he had worked on and pulled packing from. (Tr. pp. 262-263).
60. The Condition Report filed in the 14 R bag incident stated that the waste in the bag which was later read at 14 R and tagged by Complainant at 2 mR/hr, was to have come from the valve labeled 1B33MOV23A. (CX-4, p. 3).
61. Mr. Lawrence H. Dautel testified in this matter, Mr. Dautel, at the time of hearing, was employed by Respondent as a Radiation Protection Technician first class and was a lead technician. Mr. Dautel testified that he was present during the conversation between Mr. Heath and Complainant regarding whether or not an RDR would be written up for ladder incident. Mr. Dautel stated that the conversation between the two was loud. (Tr. pp. 275-276).
62. According to Mr. Dautel, after the ladder and the 14 R bag incident, Complainant was assigned day to day routines which were minor things. Mr. Dautel stated that Respondent, for the most part, did not try to re-qualify Complainant in order to get him back on shift and help with the workload. Mr. Dautel testified that for a while, Complainant was just a body in the department

without any qualifications to do anything. Mr. Dautel stated Respondent's management made more inquiries as to Complainant's activities as compared with other technicians. (Tr. p. 283).

63. Gregory Alonzo King testified in this matter. Mr. King, at time of hearing, worked for Respondent as a Radiation Protection Technician first class. Mr. King was working the night shift during the time that Complainant allegedly left a radioactive source in an instrument. Complainant's job that night had been to response test the instrument that would be used by Mr. King to conduct air samples. Mr. King conducted the air samples that night. (Tr. pp. 297, 305).

64. Based on the results he obtained from his samples, Mr. King is of the opinion that Complainant did not leave the source in the instrument. To support his opinion, Mr. King attempted to re-enact the scenario. After completing his re-enactment, which Mr. King felt to be accurate, he was still of the opinion that the source was not in the instrument at the time that it was counted. (Tr. pp. 307-315, 317).

65. Mr. King agreed that there were a number of variables that could affect the results of his re-enactment such as background radiation, the instrument used, the calibration of the instrument, the paper used in the instrument, and the source used. Mr. King stated that on the night the source was allegedly left in the instrument, he did not recall seeing the source in the instrument. (Tr. p. 320).

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66. Mr. Philip Douglas Graham testified in this case. Mr. Graham, at the time of Complainant's transfer to the tool room, was the vice-president of River Bend Nuclear Group. As such, Mr. Graham was the senior nuclear officer. As vice-president, he reported to the chief executive officer of the company and was primarily responsible for the safe and reliable operation and maintenance of the nuclear facility. Mr. Graham was also involved in internal and external communications as well as human resources. (Tr. pp. 325-326).

67. Mr. Graham testified that the providing of false information to the NRC would result in a civil penalty to Respondent and could result in a civil penalty against the individual who made the misstatement. According to Mr. Graham, where a violation results from the actions of a lower-level employee, it is the licensee who is held responsible by the NRC unless it is a wilful disregard of an NRC rule or regulation, in which case the NRC could take action against the individual. (Tr. pp. 341-342).

68. Mr. Graham stated that he received a form R-57 from the NRC which is a notice of violation and proposed imposition of a civil penalty in the amount of $100,000. Mr. Graham stated that the NRC originally cited Respondent for 17 violations, but eventually only cited Respondent for 14. According to Mr. Graham, Complainant was directly or indirectly responsible for 9 of the remaining 14 violations. Most of these violations were "cascading" from the initial improper survey of the 14 R bag. (Tr. pp. 357, 363).

69. Of the violations, Mr. Graham explained that Respondent was cited for a failure to perform adequate surveys. This violation dealt with the finding of a bag of radioactive material that was improperly tagged with a lower indication of

radioactivity than actually existed. This tag also bore Complainant's initials. The bag in question was not the 14 R bag, but was instead a different bag found in the machine shop. (Tr. p. 369).

70. According to Mr. Graham, as immediate corrective action against Complainant, he was disqualified from performing radiation protection duties and he was placed in a remedial training program and given the opportunity to requalify on radiation protection activities. Mr. Graham stated that it was his expectation that Complainant would requalify and resume his normal duties. (Tr. pp. 376-377).

71. Mr. Graham stated that at one point he was approached by some of his managers and supervisors concerning reassignment of Complainant. In reaching a judgement as to the appropriate action to be taken, Mr. Graham took into consideration the 14 R bag incident, the source incident, the incident where Complainant had brought a TV into the plant with the excuse that he brought it there to be repaired, and an instance where Complainant was in the plant on duty but could not be located by his management. As a result of discussions with several supervisors, Mr. Graham felt that there were a number of data points that reflected on Complainant's performance capabilities with regard to radiation protection. Mr. Graham explained that the position of radiation technician is essentially one where the technician is on his own and is entrusted to use his own good judgement. If management lacks confidence in the

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individual's ability to do so, then concerns are raised. Mr. Graham felt that the history of events involving Complainant's performance and other events that he had been disciplined for, gave the strong sense that Complainant was not trustworthy enough for the placement of unlimited management trust and continued employment without supervision. Mr. Graham stated that it was a culmination of events that led to the transfer of Complainant.(Tr. pp. 382-387).

72. Concerning Respondent's relationship with the NRC, Mr. Graham stated that all pertinent information was made available to the NRC in the course of their investigation. Mr. Graham stated that it is made clear to the employees that they have a right to talk to the NRC whenever they want to, however, it is preferred that employees bring their concerns to the supervisors and give management a chance to solve the problem before it is brought before the NRC. With respect to the investigation which was being conducted by Respondent, Mr. Graham stated that employees who were dissatisfied with the company's position would have an opportunity to speak with the NRC. (Tr. pp. 389-392).

73. According to Mr. Graham, he never received any information from the NRC casting doubt on Respondent's conclusions as to Complainant's responsibility for the activities which Respondent had been cited for in the violations. (Tr. p. 394).

74. Mr. Graham stated that his concurrence on the transfer of Complainant was "based on a history of issues or performance problems that indicated a lackadaisical attitude towards radiation protection. I questioned the personal integrity and trustworthiness of the employee; and it stemmed back from the first episode that I recollected with the TV where there was not supposed to be a TV

on a day where work was supposed to be being performed, an instance where his management was unable to locate Mr. Paynes while he was on duty at the plant for a significant length of time, the involvement in the radioactive material control or loss of radioactive material control of the 14 R bag, and then finally the loss of the radioactive source for calibrating instruments." (Tr. p. 395).

75. Mr. Graham stated that he first learned that Complainant had written an RDR concerning the ladder incident and had participated in a heated discussion with Mr. Heath in June of 1993 when Complainant came to visit him in his office and present to him a write-up of his side of the story, and an explanation for the 14 R bag incident. (Tr. p. 396).

76. Mr. Graham stated that he had no recollection of ever hearing or reading that certain mechanics, technicians and deconners disagreed with the results and findings of the investigation. However, Mr. Graham was aware that Complainant and the deconners, on the day the alleged 14 R bag was handled, were wearing dosimeters and that the dosimeters did not have any reading on them. (Tr. pp. 419-421).

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77. According to Mr. Graham, all opinions are taken into consideration. In explaining some of the discrepancies between the investigation findings and the opinions of some of the employees, Mr. Graham stated that: " the physical rules involving radiation is such that the intensity of that radiation drops off with the distance from the source. So if you double the source, double the distance to the source, the exposure or the radiation level goes down by a factor of four...for that particular reason, as this source moves along by monitors, by people and stuff, depending on the distance that they are relative to that source, they could easily register no radiation at a distance of five feet or maybe even less than that from this particular bag, or certainly a radiation level that's less that 100 MR per hour which would have been within the bounds or our program and controls for everything that we did." (Tr. pp. 422-423).

78. Mr. Graham testified that unless a worker went up to the 14 R bag and put a meter on it, then that bag could have been invisible to all the workers until it was actually discovered. Mr. Graham stated that the bag was discovered by workers who noticed increased readings on their pocket dosimeters. In explaining why increased readings had not been picked up by previous workers near the bag, Mr. Graham stated that the workers who discovered the 14 R bag may have received their increased readings from other nearby sources in the room where the bag was located. In explaining how a worker could have unloaded the 14 R bag without his dosimeter going off, Mr. Graham stated that it was conceivable that the source could have been on the outside of the bag away from where the alarming dosimeter is carried such that there could be as much as four feet of distance between that point source and the alarming dosimeter. (Tr. pp. 423, 430).

79. Joseph P. Schippert testified in this matter. Mr. Schippert, at the time of Complainant's transfer to the tool room, was the plant manager at the River Bend Station. According to Mr. Schippert, with regard to the personnel violations which were attributed to Complainant, the NRC expressed concern for personnel failure

to follow the requirements of the radiation protection program as well as concern for weakness in that program and the failure of management to develop adequate feelings of accountability in the entire plant population with regards to radiation protection issues. (Tr. p. 464).

80. Mr. Schippert testified that one of the violations which was attributed to Complainant was eventually dropped because management persuaded the NRC that there was an adequate survey performed in that instance. (Tr. p. 465).

81. Mr. Schippert stated, that in addition to the $100,000 penalty assessed against them by the NRC, there were other costs associated with the violation. Mr. Schippert explained that these costs included the cost of taking management and the technicians and reviewing the violations, doing the thorough reviews that were necessary, and preparing for the NRC inspection. Additional costs were the company's own investigation of the 14 R bag incident and, the cost of remedial and corrective actions taken in the form of additional procedural barriers and training. (Tr. pp. 477-478).

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82. Mr. Schippert also felt that when the NRC finds violations such as the 14 R bag incident, it reflects poorly upon the company. Also the NRC inspectors refer to the "enforcement history" of the licensee when evaluating performance and they increase their monitoring when the enforcement history of the licensee is bad. (Tr. p. 478).

83. Mr. Schippert stated that all the information he learned about Complainant concerning his personnel record was learned after the enforcement conference with the NRC. (Tr. p. 484).

84. Mr. Schippert made the decision to transfer Complainant into the tool room. According to Mr. Schippert, this decision was based on the fact that there had been a succession of events, including Complainant's qualification removal. Mr. Schippert felt that there was a risk to the plant and a risk to the plant workers with Complainant's level of performance. Mr. Schippert stated that no other factors, other than Complainant's performance, played a part in his decision. (Tr. p. 491).

85. Mr. Schippert stated that his decision to transfer Complainant was initially discussed with Mr. Cargill and Mr. Hardy, and then later with Mr. Nelson Carver of human resources, and then finally with Mr. Graham. (Tr. p. 491).

86. According to Mr. Schippert, during the initial discussions, it was recommended to him that Complainant should be terminated in his employment based on his history of performance problems. Mr. Schippert testified that he was convinced by Mr. Carver that a viable alternative to termination would be the job in the tool room. Mr. Schippert stated that he then convinced Mr. Hardy and Mr. Cargill of this. (Tr. p. 494).

87. Mr. Schippert stated that he first learned of the RDR written on the ladder when he was in the human resources department the week before hearing. Mr. Schippert stated that hundreds of RDR's are written every year and that several are written throughout the day. (Tr. p. 495).

88. Mr. Schippert testified that the company policy with regard to RDR's is that the employees are encouraged to write them. Concerning condition reports, they

are reviewed by the plant manager or his designee. RDR's however, are mainly reviewed by the radiation protection manager, although Mr. Schippert will review a sampling of the RDR's. (Tr. p. 497). Mr. Schippert was of the opinion that the improper placement of the ladder necessitated an RDR. (Tr. pp. 521-522).

89. Mr. Schippert testified that, at the time he was contemplating the transfer of Complainant, he was not aware of any interpersonal problems Complainant might have had with any of his foreman, in particular Mr. Heath. (Tr. p. 497).

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90. Mr. Schippert stated that as both his personal policy and his company policy, he will not tolerate a supervisor's disciplinary action against an employee for raising a safety concern. (Tr. p. 498).

91. Mr. Schippert felt that the 14 R bag incident, regardless of who was at fault, reflected poorly on the supervisor and manager of the radiation protection program. (Tr. p. 503).

92. According to Mr. Schippert, he was not aware that the mechanic who removed the third ring of packing from the valve B33MOV23A, stated that the 14 R packing was not the same packing as the material he removed from valve B33MOV23A. Nor was Mr. Schippert aware that the deconner's allegedly put the B33MOV23A valve material into a different colored bag. Similarly, Mr. Schippert stated that he did not have specific recollection of the nature of the surveys performed when the 14 R bag was allegedly on the farm wagon, or of the dosimetry worn by the workers moving the bag. (Tr. pp. 516-518).

93. Mr. Edwin M. Cargill testified in this matter. At time of hearing, Mr. Cargill was the director of the radiological program for Respondent. (Tr. p. 534).

94. Mr. Cargill explained that the NRC standards for radioactive exposure is 3 rem per quarter or 12 rem per year, however, Respondent maintains a standard of a maximum of 5 rem per year and has an administrative goal of 4 rem per year. In order to meet this standard, certain restrictions and programs are in place. Mr. Cargill stated that with any work that goes on in a radiological controlled area ("RCA"), Radiation Protection Technicians usually enter the area first in order to survey for radiation dose rates, loose contamination, and any airborne contaminants. If necessary, the technicians will stay with the craftsmen throughout the job. All personnel work under a radiological work permit which will stated the requirements for radiological safety and what protective devices must be worn. Workers also carry different devises to detect radiation. (Tr. pp. 538-540).

95. Individuals performing work in RCA wear thermoluminescent dosimeters ("TLD's") which monitor and record radiation dose, and provide the official record of the employee's dose. The TLD cannot be read by the employee, rather it is read by the Radiation Health Organization on a quarterly basis. (Tr. pp. 536-541, 734-735).

96. Workers are also supplied with pocket dosimetry, which can be read by the worker. It is not the official record of dose because it is subject to some variation. The pocket dosimeter probably has an error rate of ten to twenty percent due to shock, temperature, and humidity. (Tr. pp. 534-541).

97. Radiation protection technicians are supposed to record readings from their pocket dosimetry each time they exit the RCA. If a technician receives a dosed, it should be recorded on

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the Radiological Work Permit ("RWP") and put into the computer so that it can go against a computer bank of pocket chamber dose. The pocket chamber dose is tracked on a regular basis, then when the TLD is read, the TLD data will go into the computer and delete the pocket chamber dose, because the TLD data is more accurate. (Tr. p. 542).

98. Typically, according to Mr. Cargill, if an employee reads his dosimeter to have a value of 3 mR after a job, he will record 5 mR because there is potential "drift" in the accuracy of the instrument. (Tr. p. 542).

99. Area radiation monitors are fixed devices that read out at a panel in the Control Room. Although each area monitor is supposed to be constantly in service, there may be times when some are inoperable. Continuous air monitors are monitors which sample for airborne radioactivity. Some of these monitors read out in the Control Room, while others are local readouts. Additionally, there are general survey instruments called portable area radiation monitors, which can be placed in an area to detect increased levels of radiation. (Tr. p. 543).

100. Mr. Cargill, in explaining the job functions of a radiation protection technician, stated that the radiation protection technician is responsible for taking the radiation surveys for dose rates, the contamination surveys, the airborne surveys, writing the RWP's, working with the craftsmen as they perform their duties. The radiation protection technician has responsibility to put information from his surveys on maps or diagrams to show where radiation exists. The technician also has responsibility for posting areas with high radiation levels and creating physical barriers to those areas, as well as responsibility to accurately tag bags of waste. (Tr. pp. 546-547).

101.According to Mr. Cargill, failure of a radiation protection technician to properly carry out his duties results in a violation of 10 C.F.R. 20 and the technological specifications for the plant, as well as an adverse reaction from the NRC and the potential for a person to become excessively exposed to radiation. (Tr. p. 547).

102. Concerning the 14 R bag, Mr. Cargill stated that 14 R was a contact reading. Mr. Cargill stated that at 18 inches away, the reading was between 100 and 120 mR per hour, which is right at the cutoff level for a high radiation area. (Tr. p. 549).

103. Mr. Cargill testified that the results of the in-house investigation and the NRC investigation, with respect to the 14 R bag, were essentially the same. Mr. Cargill stated that the NRC representatives did not tell him anything which caused him to have any doubt regarding his conclusions about Complainant's responsibility for the mistagged bag. (Tr. pp. 553-554).

104. According to Mr. Cargill, Respondent had in place a policy of progressive discipline. This policy was designed to keep an individual employed when there

are performance problems. Under the policy, a person with performance problems will first get a

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warning. Should the performance problems continue, that person then gets a letter of reprimand. After that, the person is forced to take time off without pay. Eventually, if the performance problems continue, the employee is terminated in his employment. Mr. Cargill stated that Complainant went through the progressive discipline system. (Tr. pp. 560-561).

105. Mr. Cargill, in explaining his experience with Complainant as a technician in his department, stated that Complainant had some problems in the training area, especially with mathematics. Complainant was allowed to retrain. According to Mr. Cargill, Complainant initially seemed to be very interested in what was going on and was even studying after hours. Mr. Cargill stated that after Complainant came to the plant he did not have much contact with him but had heard that Complainant was argumentative in the sense that if he was asked to do something he would argue about whether it needed to be done. (Tr. p. 564).

106. Mr. Cargill stated that he and Mr. Hardy eventually concluded that it was time to terminate Complainant based upon a major violation with the 14 R bag, subsequent other violations (the sling, the source), and, less than two months after these violations, the problems Complainant had following procedures (not checking in instruments). Mr. Cargill stated that he felt that he could not trust Complainant as a Radiation Protection Technician. (Tr. pp. 571-573).

107. Concerning the RDR on the ladder which was written by Complainant, Mr. Cargill reviewed the document on October 16, 1992 and signed the document. Mr. Cargill estimated that the number of RDR's submitted that year fell somewhere in between 600 and 700. According to Mr. Cargill, when he reviews and RDR his main concern is taking care of the situation, the person who actually wrote the RDR is not important. When Mr. Cargill received this particular RDR, he spoke to Mr. Jon Anderson about it and it was determined that Mr. Bill Powell was the individual who had left the ladder in that place. Mr. Cargill went to the scene with the manager of radiation protection from the NRC and looked at it. Mr. Cargill was of the opinion that there was not a violation because if an individual had climbed the ladder he would be looking right at a sign which read "Danger, High Radiation Area." (Tr. pp. 576-578).

108. In the NRC Inspection Report which detailed the violations for which Respondent was fined, the ladder incident is discussed. The report states that: "The inspectors reviewed a Radiological Deficiency Report dated September 30, 1992, which involved a ladder that was left standing in the radwaste building. On September 30, 1992, the radiation protection technician who was performing routine surveys on the 106-foot elevation of the radwaste building discovered a ladder set up in the truck bay adjacent to the wall of the liner bay. The ladder was located in a roped-off area posted "NO ENTRY." The radiation protection technician performed a survey above the ladder that indicated general area radiation levels of 100 mR/hr. The radiation protection foreman was notified and the ladder was immediately removed. The ladder had been used by radwaste

personnel under radiation protection continuous coverage on September 29, 1992 to obtain a liner serial number. The

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radiation protection technician covering the work failed to ensure the ladder was removed after the work was completed..."(RX-56, p. 12).

109. Mr. Cargill stated that at the time he reviewed the RDR written by Complainant, he did not even notice who had written it. Mr. Cargill stated that the first time he had realized that Complainant had written the RDR was when he saw a Department of Labor document in which Complainant claimed the RDR was protected activity. At that time, Mr. Cargill also learned of the argument between Complainant and Mr. Heath. Mr. Cargill was of the opinion that Mr. Heath as well as the other foreman all had the same problem with Complainant, which was that Complainant would argue about doing particular jobs.(Tr. pp. 578-579).

110. According to Mr. Cargill, within the radiation protection department, the policy towards safety concerns and the preparation of RDR's was such that employees were encouraged to report problems so that they could be fixed. Mr. Cargill stated that the policy was the same from the top management down and that reporting and documenting safety concerns was the top agenda. Mr. Cargill stated that there is also a quality concern program where an employee can put their concern on a piece of paper and anonymously put it in a sealed box where only the quality concern people can look at it. A Condition Report can also be initiated anonymously to protect the personnel if they feel like they need protection. Mr. Cargill stated that he was not aware of any situation where an employee within the radiation protection department has ever been reprimanded or disciplined in some way for raising a safety concern or preparing an RDR. According to Mr. Cargill, Complainant's involvement in the ladder incident was not a factor in his recommendations for disciplinary actions. (Tr. pp. 580-581).

111. Concerning the 14 R bag, Mr. Cargill explained that if a worker who was handling the 14 R bag was wearing an alarming dosimeter set to go off at a dose rate of 100 mR, the dosimeter alarm would not necessarily sound. Mr. Cargill stated that it would depend on how fast the worker handled the bag, as radiation is measured in millirem per hour. For example, only if a worker stayed close to a source emitting 220 millirems for one hour would 220 millirems would be picked up. At the same time, the dose rate of the instrument is somewhat slow and it takes at least 10 to 15 seconds at a minimum for the instrument to respond. (Tr. pp. 601-602).

112. Mr. Wayne Charles Hardy testified in this matter. At time of hearing, Mr. Hardy was employed by Respondents as a Radiation Protection Supervisor. (Tr. p. 622).

113. Mr. Hardy is involved in the evaluation procedure by which employees are promoted to foremen. Mr. Hardy stated that he had a very strong influence in the promotions of all the foremen, including Mr. Heath. At the time Complainant was transferred to the tool room, Mr. Hardy was the immediate supervisor of Mr. Heath. According to Mr. Hardy, Mr. Heath conducts himself in a professional manner, is technically confident, and he provides assistance and coaching to the

technicians. Mr. Hardy stated that he did not know of Mr. Heath having any difficulties in interacting with the technicians. Mr. Hardy stated that during the time Complainant worked as a technician, he had not been alerted to any problems in the relationship between Mr. Heath and Complainant, nor was he aware of any animosity or friction in that relationship. (Tr. pp. 636-638).

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114. Mr. Hardy, in reviewing the violations cited by the NRC, stated that one of the violations were two additional bags in the Hot Tool Shop which were also mistagged. One of these bags was tagged by Complainant as being less than 2 mR per hour although the bag gave off 80 mR per hour. According to Mr. Hardy, the most disturbing thing about that mistagging was that the bag had been previously tagged by another technician as being 100 mR per hour, and that tag was still affixed to the inner bag when Complainant subsequently tagged the outer bag as reading 2 mR per hour. (Tr. p. 662).

115. Concerning the sling incident, Mr. Hardy explained that the sling was such that it should not have been released without a survey performed on it. At the plant, a policy is in place to insure that material does not get outside the protected area, which is an area with a fence and a security monitor. The policy is called the green tag policy, which provides that in order to take something out through security, a green tag needs to be on the object saying that it has been evaluated by Radiation Protection and is free of radioactive material and radiation. During 1992, Respondent had a policy that a Radiation Protection technician could evaluate the material and choose to either perform the survey, or, based on the material, not perform the survey but still issue the tag. In this case, the technician must use his best judgement and perform the survey depending on the probability of the material or object being contaminated or being in an area where contamination was likely. The exception to this policy is that tools, under no circumstances, would be released from the protected area without performing a survey. The reason for this exception is that tools, by their nature, are brought to many different places throughout the plant. According to Mr. Hardy, Complainant chose not to survey the sling and he issued a green tag to the individual to remove it from the protected area. This was documented by Complainant on a special sheet that said "Material Released From Area Without a Survey." (Tr. pp. 665-667).

116. Mr. Hardy stated that releasing an object from the protected area now requires a survey. (Tr. p. 668).

117. One of the NRC's cited violations was violation B-4, which was "control of radiation protection equipment." Mr. Hardy explained that during the investigation, one of the things that was thought may have contributed to why Complainant had allegedly not surveyed and tagged the 14 R bag correctly was that his instrument may have been faulty. In trying to ascertain which instrument was used, it was realized that Complainant had not checked out an instrument on the day in question, thereby failing to follow the proper procedure in checking out instruments. Mr. Hardy stated that they did find a documented survey done by

Complainant with that instrument, thus identifying the instrument. Mr. Hardy stated that the instrument was found to be functioning properly. (Tr. p. 674).

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118. In recalling the 14 R bag incident, Mr. Hardy stated that when he had initially discussed with Complainant the incident, Complainant stated that he had no recollection of even going to the area where the bag had allegedly come from. Mr. Hardy stated that it wasn't until later, when computer printouts showed Complainant to have been in the area on that date that Complainant wrote a statement indicating that he did recall moving the material from the area and transporting it. Mr. Hardy stated that in the initial discussions with Complainant, he did not recall Complainant stating that he had laid down against the bag for any period of time. According to Mr. Hardy, it was not until April of 1993 that he was told by Complainant that he laid on the bag for approximately 20 to 30 minutes. (Tr. pp.684-686).

119. Mr. Hardy stated that he was aware of statement's made by Complainant indicating that he was "set up" in regard to the 14 R bag. Mr. Hardy's response was to make sure that the inspection was done properly and that there was no doubt that anybody had tampered with the 14 R bag. This was accomplished by first securing the bag and placing it in a locked-high radiation area. At that point, Mr. Hardy stated that he and his technicians then focused on searching the facility for similar hazards. (Tr. pp. 687-689).

120. In preparation to open and examine the 14 R bag, Mr. Hardy instructed Mr. Anderson to make sure that there were at least two management representatives and a union representative present when the bag was opened. Mr. Hardy also suggested that the procedure be videotaped. (Tr. p. 689).

121. Mr. Hardy stated that when the bag was opened, it was determined that the material in the bag was packing material from the B33MOB23A valve. This was determined because within the bag there was information that indicated that it was the "23A" valve, and, it was the type of material that was used within the 23A valve. According to Mr. Hardy, there were tags that said "MOB23A" on them. Mr. Hardy stated that there was also a bag that some of the materials were in that had the name of a mechanic on it, which was "Moak.". Mr. Hardy stated that the material contained within the bag was exactly as described by the mechanics. Mr. Hardy also stated that inside the outer bag was a red bag that had packing material in it, and he received confirmation from one of the radiation protection technicians who had performed surveys on the 23A valve that the red bag contained the material from the 23A valve that he had surveyed. (Tr. p. 690).

122. According to Mr. Hardy, when he initially observed the outer bag, he saw no signs that the bag had been tampered with. Mr. Hardy stated that during the investigation, the investigation team attempted to tamper with the bag to see if tampering could be done without any signs of tampering showing. According to Mr. Hardy, the investigators determined that it would be impossible to tamper with the bag without the tampering being apparent. (Tr. p. 691).

123. Mr. Hardy testified that there were no other valves, with the possible exception of valve 39C, that could have contained packing that would give off 14,000 mR. Mr. Hardy ruled

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out the 39C valve, however, because that valve had burst and blown it's packing out. Mr. Hardy recalled that the mechanics on the 39C valve were Mr. Moak and Otis Matthews and that the mechanics on the 23A valve were Mr. Ronnie Edgens and Mr. Glenis Havard. Mr. Hardy stated that the reason that Mr. Moak's name was found on one of the bags was because he was the one that checked out the tools which were used in the work done on the 23A valve. (Tr. pp. 692-695).

124. Mr. Hardy stated that there was paperwork within the 14 R bag itself. This paperwork was the maintenance work orders, and it indicated that the valve that the packing had come from was the 23A valve. (Tr. p. 738).

125. According to Mr. Hardy, Mr. Ronnie Edgens, the mechanic who testified that the 14 R packing was not the same as the packing he pulled on the 23A valve, was never shown the 14 R bag of waste but was instead shown only a photograph. (Tr. p. 696).

126. In trying to explain why the pocket dosimeters carried by the deconner's did not go off when the 14 R bag was handled, Mr. Hardy stated that in recreating the scene in which the bag was removed, it was found that the 14 R bag wound not have necessarily have caused the deconner's or Complainant to have received any measurable radiation exposure. Mr. Hardy testified that the 14 R bag acted much as it should as a point source, meaning that on one side of the bag a the dose rate could be as high as 12,000 mR, but on the other side of the bag, the radiation levels went down to 1,800 mR per hour. Mr. Hardy stated that at a distance of 18 inches from the bag, dose rates would go down to possibly less than 80 mR. per hour. Mr. Hardy also explained that the removal process is very rapid and it only takes a matter of seconds to drop the bag into another bag, seal it, and tag it. (Tr. p. 700).

127. Mr. Hardy stated it could not be said with any certainty that any worker carried the 14 R bag on their back. Mr. Hardy also stated that even if the bag had been carried on someone's back, it could also not be said how long the bag was carried. According to Mr. Hardy, assuming a worker had carried the bag on his back, the radiation recording of a pocket dosimeter would be immeasurable since the bag would have only have been carried for 30 seconds or less, which means that the measurable radiation would be 30 seconds divided into 14,000 millirem. Mr. Hardy stated that had a worker carried the bag, the worker only would have accrued one or two millirem during the short time he carried the bag. (Tr. pp. 702-703).

128. According to Mr. Hardy, radiation equipment, located in the drywell where the 14 R bag was temporarily stored after work had been completed on September 3, 1992, showed increasing dose rates in the area from .7 mR per hour to almost 9 mR per hour. (Tr. p. 704).

129. Concerning the color of the bag the 23A valve packing was contained in, Mr. Hardy stated that the 14 R packing was in a clear ziplock bag but was later put in

a yellow bag, which was allegedly tagged by Complainant. Mr. Hardy stated that at the time, two types of

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bags were being used for trash, one being a yellow bag and the other being a clear bag with a border on it. Mr. Hardy felt that it would be easy for one of the deconner's to be mistaken about the color of the alleged 14 R bag since the two types of bags were used interchangeably and during the six month outage, a typical deconner would have packaged and transported thousands of bags. (Tr. p. 707).

130. Mr. Hardy stated that had the 14 R bag been placed in the center of the farm wagon or on the bottom of the trailer, the other bags around the 14 R bag would have tended to shield the radiation. Mr. Hardy stated that the portal monitors and personnel contamination monitors located on the walls of buildings were either shielded from the 14 R bag or were out of service during the time span in question. (Tr. pp. 708, 715-716).

131. According to Mr. Hardy, Complainant was not assigned a radiation dosage for his alleged contact with the 14 R bag. Mr. Hardy explained that after he was notified that Complainant had laid down or leaned on the 14 R bag, he initiated an RDR and reported the matter to his supervisor, Mr. O'Dell. As a result of the RDR, an investigation was performed through the Radiation Health Group as well as an additional investigation performed by the "QA" group. According to Mr. Hardy, both investigations concluded that no additional exposure would be assigned to Complainant. (Tr. p. 734). Mr. Hardy stated that, as he understood it, Complainant did not carry the bags and did not have sufficient contact time with the bags to have been assigned a dose. (Tr. p. 743).

132.

Mr. Hardy opined that Complainant always had the technical abilities to perform well as a radiation protection technician. However, Mr. Hardy stated that it was just a question of whether or not Complainant chose to perform his required tasks. Mr. Hardy stated that there were numerous times over the years that he had discussions with Complainant about his performance. Mr. Hardy felt that on the job, Complainant tended to be disruptive and to argue with his supervisors. Mr. Hardy described Complainant's performance as a radiation protection technician as being substantially substandard. (Tr. pp. 766-776).

133. Mr. Hardy stated that when he recommended Complainant's termination, he was not aware of any argument between Complainant and Mr. Heath regarding writing an RDR on the ladder incident. According to Mr. Hardy, Complainant's preparation of the RDR on the ladder incident did not in any way affect his decision to recommend Complainant's termination. Mr. Hardy stated that his decision was based solely on Complainant's performance on the job. (Tr. pp. 777-778).

134. Regarding the source incident, Mr. Hardy stated that an RDR was written on the matter and an investigation was conducted by Mr. Jeff Goudeau, an Radiation

Protection Foreman. Mr. Goudeau concluded that it was impossible to prove or disprove that Complainant had left the source in the instrument. However, the fact remained that Complainant checked the

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source out, had reason to have the source, used the source to perform a task, and the source was checked back in and was later found in the fuel building. (Tr. pp. 724-725).

135. Mr. Hardy stated that there had been previous problems with Complainant in taking out instruments or radiation sources and not signing them out or signing them in properly. Mr. Hardy stated that Complainant's failure to check out instruments in accordance with procedure was one of the specific things that he was disqualified on and received remedial training for. Mr. Hardy felt that the source incident was particularly disturbing as this was something Respondent's had received a violation on, after which Respondent had retrained and requalified Complainant, and yet he still failed to adequately perform the task. (Tr. p. 725).

136. Mr. Jon Scot Anderson testified in this matter. At time of hearing, Mr. Anderson was a radiation protection foreman at the River Bend station. (Tr. p. 838).

137. Concerning the 14 R bag, Mr. Anderson stated that during the initial investigation, Respondent's paperwork indicated that there were two potential high activity sources for the 14 R bag; these were the 23A valve and the 39C valve. According to Mr. Anderson, a plant-wide record search was conducted to see if there were any other high activity sources or potential high activity sources during the time frame in which the 14 R bag was generated. Mr. Anderson stated that there were not any other than the 23A and the 39C valves. Mr. Anderson identified the source as packing material contained in a small bag that was 2/3rds of the way down in the 14 R bag. (Tr. pp. 846-849).

138. Mr. Anderson stated that inventory of the 14 R bag was conducted and during that inventory, plastic face shields were found. Mr. Anderson stated that these face shields were required for work on the 23A valve, but were not required for the work on the 39C valve. Mr. Anderson stated that a "danger hold tag" was also found and a clearance sheet from the 23A valve which showed the date and the time that the tags were actually removed from that valve. (Tr. p. 850).

139. Based on his investigation, Mr. Anderson believed that Complainant had put a tag on the 14 R bag on September the 4th after lunch. The work done on the 23A valve was to remove the old packing and repack the valve in order to stop a leak. According to Mr. Anderson, two mechanics, Mr. Bynum and Mr. Moak, initially worked on the valve and removed most of the old packing material from the 23A valve, placing it in a red bag. These two mechanics left the last ring of packing in place. This last ring was removed by Mr. Harvard and Mr. Edgens, who then installed most of the new packing as well. The last ring of packing was put into a clear ziplock bag. Mr. Anderson stated that during this job, both mechanics received some radioactivity that set off the contamination monitors. The two initial mechanics, Mr. Bynum and Mr. Moak, then went back into the area to finish repacking. They were accompanied by Mr. Holland, a radiation

protection technician, who was to do a verification survey on the packing material since Mr. Harvard and Mr. Edgens had an uptake of radioactive materials. According to

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Mr. Anderson, Mr. Holland surveyed the red bag full of packing and got readings of 800 mR per hour of Gamma radiation and 1000 mR per hour of Beta radiation. Mr. Anderson stated that Mr. Holland did not survey the clear bag containing the last ring of packing as it was thought by Mr. Holland that all of the packing was contained in the red bag. (Tr. pp. 854-858).

140. In regard to the 14 R bag, Mr. Anderson stated that there were several violations committed by Complainant. Mr. Anderson stated that first, the dose rate meter was not signed out. Second, the 14 R bag was mistagged as less than 2 mR per hour. The tag also indicated a survey number 925012. This number is a cross reference to a document, however, no document was filed under the number 925012. Complainant also did not document his survey activities on a log sheet. Complainant also was not signed on to a radiation work permit (RWP) when there was a requirement to do so when working in a high radiation area. (Tr. pp. 881-882).

141. Mr. Robert Grant Bare testified in this matter. Mr. Bare, at time of heating, was employed by Respondent as a senior technical specialist. Prior to that, Mr. Bare was a radiation protection foreman from December of 1990 to August of 1993. Mr. Bare was involved in the investigation of the 14 R bag. In opening the 14 R bag, it was Mr. Bare's testimony that the tape on the bag had not been previously removed. Mr. Bare based this opinion on the observation that previous removal of the tape used to seal the bag would have caused residue to have been left. (Tr. p. 959).

142. Mr. Bare, in the course of his investigation, concluded that the high radiation material came from the 23A valve. This conclusion was based on the discovery of plastic face shields, the type of clothing used, and a "danger" tag issued for the 23A valve. (Tr. pp. 968-969).

143. Mr. Bare was of the opinion that Complainant was a very knowledgeable technician who knew the procedures but would not always follow them. (Tr. p. 978).

144. Mr. John Standridge testified in this matter. Mr. Standridge, at time of hearing, was employed by Respondents in the training department. Mr. Standridge worked as a radiation protection foreman for four years. During those four years, Complainant worked on his crew for about two years. (Tr. p. 1063).

145. Concerning Complainant's job performance, Mr. Standridge stated that Complainant was very knowledgeable but that he did not always apply himself to the standards that were required for safety. Mr. Standridge stated that Complainant required more direct supervision than the other technicians. Mr. Standridge was also of the opinion that Complainant did not accept criticism very well and would not accept responsibility for his mistakes. Mr. Standridge stated that he had, in the past, discussed these concerns with Mr. Hardy. (Tr. pp. 1065-1070).

146. Mr. Daniel Leroy Heath testified in this matter. At time of hearing, Mr. Heath was employed by Respondent as a radiation protection foreman. Mr. Heath stated that he viewed Complainant as a competent technician although he found fault with Complainant's attitude towards his job. Mr. Heath explained that Complainant would sometimes question the need for his assignments. (Tr. pp. 1137-1138).

147. Mr. Heath stated that he did not recall having a heated argument with Complainant. Concerning the ladder incident, Mr. Heath stated that he had not wanted to write an RDR at the time Complainant had requested to write one, as he had not had a chance to talk with Mr. Spratten, who was involved in the incident. Mr. Heath stated that he intended to initiate and RDR or a CR after he had spoken to Mr. Spratten, and that he would have had Mr. Pendergraft, who found the ladder, prepare the documentation. (Tr. p. 1144).

148. Mr. Heath stated that he did not participate or make any recommendations with respect to the decision by Respondent to transfer Complainant to the tool room. (Tr. p. 1147).

149. A Radiological Work Practices Evaluation Form dated 12-11-90 and signed by Foreman David R. Jennings states that Complainant "side tracks himself with all the extracurricular activity" which causes him to have problems in performing his tasks at the highest level. Mr. Jennings goes on to stated that Complainant is capable of doing much better. (RX-18).

150. A Radiological Work Practices Evaluation Form dated 3-12-92 and signed by Mr. Jennings stated that Complainant "flew off the handle to the extent of being disrespectful." Mr. Jennings stated that Complainant was totally out of line and was advised that his "bad attitude" would be documented and that his behavior would not be tolerated. (RX-20).

151. A Radiological Work Practices Evaluation Form dated 8-28-92 and signed by Mr. Jennings stated that a survey done by Complainant was totally unsatisfactory. Mr. Jennings stated that he talked with Complainant and that there was confusion on what his duties were, however, the tasks that were completed were not done so properly. (RX-21).

152. An evaluation dated 9-21-87 signed by H.R. Green stated that Complainant's attendance and punctuality needed improvement as well as his interpersonal relationships with fellow employees. (RX-30).

153. An evaluation dated 2-15-91 states that Complainant has fair punctuality and attendance and has done a good job of completing the qualification cards. The evaluation states that Complainant does a very good job on tasks that interest him and he should apply this to all assigned tasks. Weaknesses listed are instances of incomplete or inaccurate documentation, uncooperativeness with superiors and peers, as well as a lack of motivation. The evaluation states that during the past month Complainant had demonstrated improvement in cooperativeness and motivation and that with continuation of this trend he could upgrade from marginal average to solid average or above average. (RX-33).

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154. An evaluation dated 10-9-91 stated that Complainant's punctuality had been good most of the year, however, recently he has had a problem with tardiness. Complainant's attendance had been fair. The evaluation stated that Complainant had the potential to be a very good technician provided that he can improve his attitude, cooperate with others and apply himself at work. The evaluation stated that when Complainant is supervised closely, his work output is above average. Regarding weaknesses, the evaluation stated that Complainant's documentation had improved but still needed improvement. The evaluation further stated that Complainant "does not apply the same good principles to routine type tasks as he does to tasks that interest him. He demonstrates uncooperativeness with superiors and tends to lose motivation in the absence of supervision. Recently he has demonstrated a negative trend in job performance. (RX-34).

155. A Disciplinary Action form dated 10-4-91 and filled out by Mr. Standridge, states that Complainant was warned for tardiness, insubordination, and producing and possessing objectionable drawings. Complainant was reprimanded for wasting time (loafing) and neglect of duty. (RX-35).

156. In the Documentation of Unsatisfactory Job Performance which was attached to the Disciplinary Action form, it is stated that Complainant, on several occasions was been tardy for the start of shift briefings which resulted in additional overtime for technicians and hindered job performance. It further states that at the end of shift on 9-5-91, Complainant initially refused to work overtime to support shift turnover by threatening to go home sick. On 9-10-91 Complainant was asked to remove his sunglasses while working inside the plant. Complainant removed the sunglasses but continued to argue about it. It goes on to stated that this type of fractious activity is not acceptable, shows general disrespect, is disruptive, and results in Supervision wasting time in addressing these items. (RX-35).

157. The Documentation of Unsatisfactory Job Performance also states that on 9-9-91, Complainant was in possession of suggestive drawings depicting female nudity. It states that Complainant admitted drawing the picture and that similar drawings have been found in the RP storage cabinets in the plant. It also cites Complainant for challenging Supervision's authority when he was instructed to dispose of the drawing or take it home. The documentation also states that on 9-15-91, Complainant was observed exiting the Radiological Controlled Area with a portable TV and that earlier during the shift Complainant failed to answer several pages for more than one hour. It goes on to state that upon return to the office from the plant Complainant was discussing current football scores and that there is no way to obtain current football scores from within the plant. (RX-35).

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158. A memorandum by John Standridge dated November 22, 1991, details a disciplinary layoff given to Complainant. The memo states that on 11/10/91 Complainant did not respond to 18 plant pages and two radiation technicians could not locate Complainant. (RX-36).

ANALYSIS

The first issue to be addressed is whether Complainant's claim under the ERA is barred by res judicata. The parties in this case have litigated Complainant's transfer to the tool room by means of arbitration. At hearing, I reserved ruling on the admissibility of the arbitration transcript and Decision. At this time I will accept the arbitration transcript (EX-88) and the Arbitration Decision, as they are relevant as to whether Complainant's claim is barred by res judicata. The Arbitration Decision is also relevant in the determination of the presence of discriminatory intent as it is an opinion by an impartial decision-maker who conducted a hearing on similar employment issues. Further, Complainant voluntarily invoked the arbitration and the Arbitration Decision is binding upon the parties.

On November 30, 1993, the Arbitrator determined that Respondent's transfer of Complainant to the tool room was invalid as a matter of contract law, however, Complainant's performance was so unsatisfactory as to require a disciplinary demotion to the lowest position within the Radiation Protection Department.

The term "res judicata" encompasses two distinct doctrines. The first is the doctrine of "claim preclusion" or true res judicata. As described generally in the Reinstatement (Second) of Judgments, Section 24(1) (1982):

> "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger and bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose."

See Young Engineers v. U.S. Intern. Trade Comm'n, 721 F.2d 1305, 1314-1315 (Fed. Cir. 1983).

Consequently, the judgment precludes litigation of any issue relevant to the same claim between the parties, whether or not actually litigated previously. The Restatement contains important qualifying language, however:

> (1) When any of the following circumstances exists, the general rule of [Section] 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . .

Restatement, Section 26.

The Supreme Court applied this principle in Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382 (1985).

Complainant's arbitration action alleged breach of an employment contract based on Respondent's transfer of Complainant out of his seniority group. (EX-88, p. 8). The instant ERA proceeding would not encompass a breach of contract claim. Here, Complainant complains that he was transferred in violation of ERA Section 211, an issue reserved to this forum. Accordingly, because Complainant could not successfully have raised his ERA Section 211 complaint in the arbitration action, he comes within the above exception and is not barred under the doctrine of claim preclusion from proceeding here.

The second doctrine encompassed by the term "res judicata" is that of "issue preclusion" or collateral estoppel which recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. Issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. . . .It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered. Kaspar Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d at 535. Under the doctrine of collateral estoppel, it is irrelevant that the first and second proceedings are based upon different causes of action; in this case, Complainant's contractual rights were at issue in the first proceeding and Complainant's rights under Section 211 are at issue in the current proceeding. The focus is instead on particular issues which were litigated in the initial proceeding. As the Supreme Court held in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), issue preclusion by way of collateral estoppel requires that (1) that the issue under consideration be identical to the issue previously litigated; (2) that the issue was fully and vigorously litigated in the first proceeding; (3) that the previous determination of the issue was necessary for the decision in that proceeding; and (4) that no special circumstances exist that would render issue preclusion inappropriate or unfair.

The record in the instant case is quite clear as to the issues that were litigated as the result of the arbitration. The chief issue presented to the Arbitrator was whether Respondent violated any provisions of the labor agreement when it transferred Complainant to the Tool Room. (EX-88, p. 13). While on it's face, this issue and the issues in the present case may seem dissimilar, Respondent's main argument in arbitration, as it is here, was that Complainant's poor job performance justified his transfer to the tool room. This was the issue that made up the bulk of the arbitration hearing transcript. The specifics that were litigated in the arbitration regarding Complainant's job performance were also identical to the present case. That is, the Arbitrator heard testimony on the 14 R bag incident, as well as the source incident.

Accordingly, the first prong of the test for collateral estoppel has been met, which is that the issue of Complainant's job performance was litigated in both the previous and the present proceedings. Where Respondent runs into trouble, however, is with the second

and third prong of the test. As to the second prong, that the issue was fully and vigorously litigated in the first proceeding, Complainant based his case on whether Respondent was justified in transferring Complainant where Complainant was still qualified to perform his duties within his seniority group. Thus, Complainant spent little time discussing his actual job performance, other than in cross examination of Respondent's witnesses. In fact, Complainant did not take the stand in the arbitration proceeding. As for the third prong, that the previous determination of the issue was necessary for the decision in that proceeding, Respondent's also fail to meet this criteria. The Arbitration Decision revolved around Complainant's employment contract and whether or not Complainant remained qualified for his duties in Radiation Protection. Although the bulk of discussion at the arbitration hearing centered around Complainant's performance, and his poor performance justified a demotion to the lowest position in his seniority group, the main issue of the case, being Complainant's transfer to the tool room, was decided under contract law. That is, Complainant's transfer to the tool room was invalidated under contract law and his performance as a Radiation Protection Technician did not play a part in the invalidation. Accordingly, Respondent's do not meet the third test for collateral estoppel.

At this point, as this case has been fully tried on the merits, before addressing Complainant's prima facie case, I will first consider whether Respondent has produced evidence that Complainant was subjected to adverse action for legitimate, nondiscriminatory reasons. If sufficient evidence exists for such a finding, it will not be necessary to inquire into Complainant's prima facie case. Reynolds v. Northeast Nuclear Energy Co., No. 94-ERA-47, Final Dec. and Order, March 31, 1997 slip op. at 2; Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 n.9, aff'd sub nom. Bechtel Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996).

I will now examine the proffered reasons for the transfer of Complainant. Here I find that in the face of Complainant's documented job performance problems, Respondent has produced sufficient evidence to show that Complainant was subjected to adverse action for legitimate, nondiscriminatory reasons.

Previous to Complainant's transfer, Complainant was receiving job evaluations that were mediocre at best. These job evaluations frequently stated that Complainant had problems with insubordination, punctuality, completeness and accuracy of documentation, and failure to follow proper procedure with routine tasks. Past disciplinary action had been taken against Complainant for loafing, insubordination, tardiness, absenteeism while on duty, possession of a TV, and production and possession of objectionable drawings.

Without even addressing the 14 R bag incident, or the source incident, it is absolutely clear that there were serious problems in the way Complainant was performing his

duties. As a Radiation Protection Technician, the safety of plant personnel was entrusted to Complainant's keeping. In light of this, I can hardly fault any officer of Respondent for not fully trusting Complainant to responsibly carry out his duties. Notwithstanding the 14 R bag incident or the source incident, Complainant's lack of attention to detail, loafing on the job, insubordination, and failure to follow proper procedures with routine tasks would alone be sufficient to justify the transfer of Complainant considering that Complainant was entrusted with ensuring the safety of plant personnel.

A great deal of time and effort has been expended arguing and contesting the 14 R bag incident. In sum, the evidence suggests that Complainant was indeed at fault for failure to perform a routine survey. This is hardly surprising considering that Complainant has had documented performance problems for failure to follow proper procedure when engaging in routine tasks. Certainly, the surveying and tagging of trash bags during an outage would be considered a routine task. Thus, it is easy to postulate that Complainant's survey of the 14 R bag was cursory at best. This notion is also supported by the finding of two other trash bags which were mistagged by Complainant and found in the Hot Tool Shop. Further, regarding the 14 R bag incident, Complainant admitted to other serious procedural deficiencies that occurred when the 14 R bag was mistagged. These include the failure to sign out the meter used to test the trash bags, being present in a high radiation area without being on an "RWP" (Radiation Work Permit), and the failure to document the bags on a survey sheet. Since Complainant was completely lackadaisical regarding his additional duties involved in surveying the bags on that day, it is likely that Complainant used that same lackadaisical attitude in the actual performance of the surveys.

As to the accuracy of the Respondent's investigation into the 14 R bag incident, their investigation and conclusions were approved and mirrored by the NRC in their own investigation. The evidence indicates that the investigation itself was carried out with great care. Although questions arose as to the likelihood that the 14 R bag could have made it undetected through the transportation process en route to the area where it was eventually discovered, Respondent's witnesses adequately explained the circumstances by which the 14 R bag could remain undetected. Also, while there is some uncertainty in trying to recreate the exact happenings, Respondents have provided a logical and probable course of events. Complainant's explanation of the situation rests entirely with the theory that he was "set up." I find this theory to be unsupported by the evidence. Simply put, there is no direct evidence to suggest that Complainant was "set up" in regards to the 14 R bag incident.

The circumstantial evidence that does exist which supports Complainant's theory is the differences in opinion regarding whether or not the bag should and would have been detected during transport. As previously stated, adequate explanations were proffered for the 14 R bag escaping detection. Additional circumstantial evidence supporting Complainant's theory is

the differences in opinion regarding the color of the bag that was tagged by Complainant. I give this evidence very little weight. As different colored bags were used for trash disposal during the outage, and thousands of trash bags had been filled and surveyed, I find it highly unlikely that anyone could accurately remember whether the trash bag in question was yellow, clear, or clear with a yellow border. Additionally, in regards to Complainant's recollection of the color of the bag, Complainant initially couldn't even remember undertaking the particular survey job in question. Thus I find it unlikely Complainant would be able to accurately recall the color of the bag.

The final piece of circumstantial evidence supporting Complainant's theory that he was "set up," was testimony by Mr. Edgens stating that the packing that he removed from the B33MOV23A valve was not the same as the packing contained in the 14 R bag. This evidence is not compelling. Again, Mr. Edgens' opinion is based on memory of an event that occurred months earlier. Also, according to Mr. Hardy, Mr. Edgens based his opinion on a photograph of the packing taken out of the 14 R bag. Finally, much stronger evidence exists to support the notion that the packing in the 14 R bag did indeed come from the B33MOV23A valve. This evidence consists of various objects and documents found along with the packing inside the 14 R bag, including the face shields that were required for work on the 23A valve, a "danger hold tag," and a clearance sheet from the 23A valve which showed the date and the time that the tags were actually removed from that valve. Accordingly, I find that Complainant has not established circumstantial evidence sufficient to support his theory that he was "set up" in regards to the 14 R bag incident. Thus, I credit Respondent's conclusions as to Complainant's nonfeasance in regard to the 14 R bag.

Regarding the source incident, Complainant supported his story with the testimony of Mr. Gregory King who stated that he did not believe that Complainant left the source in the instrument as he had not remembered seeing the source present and the air samples he took with the instrument did not appear to be affected. Mr. King attempted to recreate the scenario and came to the same conclusion. However, on cross examination, Mr. King agreed that there were a number of variables that could affect the results of his re-enactment such as background radiation, the instrument used, the calibration of the instrument, the paper used in the instrument, and the source used. An RDR was written on the situation and an investigation was conducted which neither proved nor disproved that Complainant left the source in the instrument.

On the whole, I tend to be swayed more by Respondent's theory on the source incident. One reason being that the fact remains that the source was checked out by Complainant, was not checked back in, and was later found in the instrument that Complainant was charged with testing. Secondly, Complainant's history of failing to use proper procedure in checking out and returning instruments supports the notion that he again failed to use due care in the handling of the source.

Accordingly, I credit Respondent's theory on the source incident in

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addition their theory on the 14 R bag incident. These two serious incidents in conjunction with the documented history of inadequate performance lead to the inescapable conclusion that Respondent had multiple non-discriminatory reasons for taking adverse action against Complainant, and took the adverse action based upon those non-discriminatory reasons. This is supported by the findings of the Arbitrator, who stated:

> "Even though the Grievant understood what was required of a Radiation Protection Technician, and was fully able to perform those duties, he consistently chose, at some level, to be unreliable and untrustworthy. Job performance, which is within the Grievant's control, can be corrected, theoretically, and his failure to improve should be met with disciplinary action...[I]t appears that the Company did, in fact, transfer the Grievant in hopes that he would correct his unreliability problems in a less hazardous area. Therefore, the Grievant was, in fact, qualified as a Radiation Protection Technician, but he was disciplinarily demoted because his job performance was unsatisfactory."
> (Arbitrator's Decision, p. 19).

Accordingly, in consideration of Complainant's past documented performance shortcomings, I find that Respondent transferred Complainant for appropriate and non-discriminatory reasons. However, for the sake of argument, I will now analyze Complainant's prima facie case.

Under the ERA's employee protection provision under which this case is brought:

> (1) Discrimination against employee:
> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or any proposed provision) of this Act or the Atomic Energy Act of 1954;

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> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.], or a proceeding for the

administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. 5851(a) (1992).

To make a prima facie case of discrimination, the complainant in a whistleblower case must show that he engaged in protected activity, that the employer was aware of that protected activity, and that the employer took some adverse action against him. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

The first issue for discussion is whether Complainant was engaged in protected activity. Thus, I must first decide whether or not the safety concerns made by Complainant are sufficient for an action under Section 5851 of the ERA. As this case falls within the Fifth Circuit, Respondent's assert that we are bound by the Fifth's Circuit's ruling in Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984). The essence of the Brown & Root ruling is that employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under Section 5851. Id. at 1036. Otherwise stated, the ERA Section 5851 does not protect the filing of purely internal quality control reports; rather, it is designed to protect "whistle blowers" who provide information to governmental entities, not to the employer corporation. Id. at 1031.

However, on October 9, 1992, Congress passed H.R. 776, the Comprehensive National Energy Policy Act. President Bush signed it into law on October 24, 1992. The Act made several significant amendments to the whistleblower provision of the Energy Reorganization Act of 1974 (ERA), section 210 (42 U.S.C. § 5851), including, explicit coverage of internal complaints as protected activity. Thus, the ruling in regard to internal complaints contained in Brown & Root has been effectively statutorily overruled and internal complaints and concerns are sufficient to constitute protected activity.

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While it is clear that an internal filing may constitute protected activity, it is not clear that the RDR filed by Complainant is sufficient to be such. Here, the fact that Complainant's filing was not a "complaint" per se, the RDR may still constitute protected activity. Under the ERA, it is protected conduct for an employee to file internal quality control reports. Bassett v. Niagara Mohawk Power Corp., 85-ERA-34 (Sec'y Sept. 28, 1993). The RDR filed by Complainant is such a report. The issue here is whether Complainant's documentation of a safety concern that was raised by another employee,

Mr. Pendergraft, is sufficient to constitute protected activity. I find that it is. Although Complainant did not discover the safety concern and only received information about it second hand, Complainant did further the safety concern process by documenting it. Had the ladder incident not been documented,[1] then it would not have come to the attention of Respondent's higher level management and ultimately, the NRC. Since the ERA is structured to protect those who raise safety concerns with the NRC, and only by documentation does such an incident receive the attention of the NRC, the act of documenting a safety concern, even the concerns of others, must be construed as protected activity.

As Complainant has established the first prong of his prima facie case, the second prong of Complainant's prima facie case is that Complainant must establish Employer knowledge of the "protected activity." To establish the element of knowledge of Complainant's protected activities,

the evidence must show that Respondent's managers responsible for taking the adverse actions had knowledge of the protected activities. Merriweather v. Tennessee Valley Authority, Case No. 91-ERA-55, Sec. Ord., Feb. 4, 1994, slip op. at 2; In doing so, a complainant can prove knowledge of protected activity by either direct or circumstantial evidence. Bartlik v. Tennesee Valley Authority, Case No. 91-ERA-15, Sec. Ord., Apr. 7, 1993, slip op. at 4.

Complainant's transfer to the tool room, which is the adverse action complained of, occurred on January 14, 1993. The officer's responsible for this transfer, included Mr. Graham, the vice president. Mr. Graham stated that he first learned that Complainant had written an RDR concerning the ladder incident, and had participated in a heated discussion with Mr. Heath, in June of 1993 when Complainant came to visit him in his office and present to him a write-up of his side of the story, and an explanation for the 14 R bag incident.

Mr. Schippert stated that he made the decision to transfer Complainant. This decision was initially discussed with Mr. Cargill and Mr. Hardy, and then later with Mr. Nelson Carver of human resources, and then finally with Mr. Graham. Mr. Schippert stated that he first learned of the RDR written on the ladder when he was in the human resources department the week before hearing. Mr. Cargill stated that at the time he reviewed the RDR written by Complainant, on October 16, 1992, he did not even notice who had written it. Mr. Cargill stated that the first time he had realized that Complainant had written the RDR was when he saw a Department of Labor document in which Complainant claimed the RDR was protected activity.

At this time, Mr. Cargill also learned of the argument between Complainant and Mr. Heath. Mr. Hardy stated that when he recommended Complainant's termination, he was not aware of any argument between Complainant and Mr. Heath regarding writing an

RDR on the ladder incident. He was however, aware that Complainant had written the RDR, but according to Mr. Hardy, Complainant's preparation of the RDR on the ladder incident did not in any way affect his decision to recommend Complainant's termination.

As to credibility, I have no reason to disbelieve the testimony of the above mentioned officers of Respondent. No evidence exists to suggest that any of the above officers have falsified their testimony. Thus, in crediting their testimony, it is established that the only officer who participated in the decision making process that resulted in Complainant's transfer who was aware, at the time of transfer, of Complainant's internal safety concerns, was Mr. Hardy. Under the ERA, the evidence must show that officers responsible for taking the adverse actions had knowledge of the protected activities. Here, the officer that made the decision to transfer Complainant, Mr. Schippert, had no knowledge of Complainant's RDR on the ladder incident. The question remains however, whether the knowledge by Mr. Hardy, who made recommendations for Complainant's termination, is sufficient to establish Respondent's knowledge of Complainant's safety concerns.

In Young v. Philadelphia Electric Co., 87-ERA-11 (Sec'y Dec. 18, 1992), the Board found the absence of knowledge by the manager who took the adverse action to be a considerable factor in the failure to establish the knowledge element, even where a manager who did know of the protected knowledge provided input into the decision.

However, in Thompson v. Tennessee Valley Authority, 89-ERA-14 (Sec'y July 19, 1993), where the person who actually discharged the complainant was not aware of the complainant's protected activity at the time he discharged the complainant, but an employee whose input contributed heavily to the decision to terminate the complainant's employment was aware of the protected activity, the respondent was deemed aware of the protected activity. Awareness is determined by looking to those in the decision making process, and under these circumstances, although the employee with awareness did not make the decision to discharge the complainant, his input made him part of the decision making process. Id.

Thus, while it is significant that Mr. Hardy did not actually make the decision to transfer Complainant, we must examine the impact of his influence in the decision that was made. In making the decision to transfer Complainant, Mr. Schippert stated that his decision was initially discussed with Mr. Cargill and Mr. Hardy, and then later with Mr. Nelson Carver of human resources, and then finally with Mr. Graham. Mr. Schippert stated that he, Mr. Cargill, and Mr. Hardy jointly reached a conclusion that Complainant should be terminated. According to Mr. Schippert, it was he who actually later convinced Mr. Cargill and Mr. Hardy that Complainant should be transferred to the Tool Room rather than terminated. Thus, while

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Mr. Hardy's opinion was significant in the recommendation to terminate Complainant, his opinion was less significant in the decision to transfer Complainant, which is the adverse

action complained of. However, in light of the fact that Complainant's transfer to the tool room was simply an alternate course of action to termination, and some sort of severe disciplinary action was to be taken based in part on the recommendation of Mr. Hardy, I find that Complainant has established the knowledge requirement of his prima facie case.

Complainant now has the burden of establishing that Respondent took some adverse action against him. Here, it is not controverted that Complainant was subject to adverse action in the form of a transfer to the tool room. Finally, to establish the prima facie case, Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. Dartey, Case No. 82-ERA-2, slip op. at 8. It is here that Complainant's claim must fail.

Complainant's entire claim is based on a theory of discrimination in retaliation for the writing of a Radiological Deficiency Report (RDR). I find that Complainant cannot raise the inference that his writing of the RDR was the reason for his transfer to the Tool Room. First, during the period when Complainant wrote his RDR, more than 600 RDR's were written and submitted during that period. Thus, it can hardly be said that Complainant's writing of an RDR was an event that would draw unusual attention. Rather, the writing of an RDR was an unremarkable and everyday activity. Second, as a radiation protection technician, it was Complainant's job to discover and document any safety hazards in the plant. The ladder was such a safety hazard. Thus, when Complainant wrote the RDR, he was merely fulfilling one of his work duties, a duty which he had performed in the past.

Third, testimony has established that the writing of RDR's was encouraged, so that hazards could be properly and promptly dealt with. Also, it is clear that Respondent, as a Nuclear Power facility, is subject to volumes of rules and regulations which are designed to ensure the safety of plant personnel and the public at large. As a result, safety is an overriding concern, and the failure to follow proper safety procedures results in substantial fines, as evidenced by the $100,000 fine levied by the NRC. Thus, it is highly unlikely that Respondent would take disciplinary action against an employee for filing a routine and unremarkable safety concern. Further, in the event that disciplinary action is taken against an employee for the filing of a safety concern, the ERA dictates that the officer responsible for that disciplinary action will be subject to sanction under section 5846. See Brown and Root, 747 F.2d at 1035. In light of this, I find it highly unlikely that any officer of Respondent would open themselves up to sanction in order to discipline an employee for filing an every-day, routine, and unremarkable safety concern.

Fourth, testimony indicates that incidents with ladders being left up had occurred in the past. These incidents also were documented in RDR's. Thus, the occurrence documented by Complainant was not a rare happening that would demand unusual attention.

Also, there is no evidence of any other employee being disciplined for writing an RDR on a ladder being left up. Fifth, had Complainant not submitted the RDR on the incident, Mr. Heath was going to initiate an RDR or a CR on the incident. Sixth, in regard to the ladder incident being a source of an NRC violation, the violation and the resulting fine imposed by the NRC had nothing to do with the actions of Complainant. Although Complainant did write the RDR, as stated before, had Complainant not written the RDR, it would have been written by Mr. Heath or Mr. Pendergraft, who had found the ladder in the first place. Also, it was Mr. Cargill's decision to further investigate the situation and involve the NRC.

It is not clear to me that writing an RDR on a ladder that was inadvertently left up would be such an occurrence that would evoke a serious adverse action such as a transfer. Certainly, in the face of the other incidents credited to Complainant, such as the 14 R bag incident, Complainant's involvement in the ladder incident was decisively minor. If anyone would have been on the receiving end of disciplinary or discriminatory action regarding the ladder incident, it would have been Mr. Powell, who was responsible for leaving the ladder in the wrong place.

In review of the evidence, I find it exceedingly difficult to infer any discriminatory intent on the part of Complainant's supervisors. If anything, Respondent's management had been quite lenient in their treatment of Complainant. Complainant went through the entire disciplinary system. Moreover, Complainant was afforded retraining and given opportunities to requalify for the work for which he had been temporarily suspended. Complainant was also transferred to a different department rather than terminated. This is a case, I believe, where Complainant's termination would have been justified. This notion is supported by the decision of the Arbitrator who stated:

> "The Grievant, apparently, has chosen to contest the transfer and will be returned to the Radiation Protection Group. It seems regrettable in this case that the Grievant has chosen the path which will expose him to the greater possibility of termination. In some respects, the Grievant may have won this battle, only to risk losing the war. It appears from the evidence in the record, that the Company may well be justified in discharging the Grievant the next time his job performance is unsatisfactory."

(Arbitrator's Decision, p. 21).

The Arbitrator also stated:

> "Unsatisfactory job performance in a nuclear plant by an employee with the responsibility of monitoring radiation exposures for the protection of employees and the general public is especially serious. The Company's attempt to transfer the Grievant to the Tool Room can be considered nothing less than a good faith attempt to meet its obligations under Federal Regulations."

(Arbitrator's Decision, p. 20).

Considering the evidence as a whole, I find that Respondent's disciplinary treatment of Complainant, in light of Complainant's performance shortcomings, has been fair and even lenient, and free of any discriminatory intent.

At hearing I also reserved ruling on Respondent's exhibit 87. At this time I will accept this exhibit as I find it relevant for this section of Complainant's prima facie case. Respondent's Exhibit 87 is the Determination made by the Equal Employment Opportunity Commission ("EEOC"), New Orleans District Office, and the complaint made to them by Complainant. The EEOC in their determination, found that the evidence obtained during their investigation did not establish a violation of statute. (EX-87, p. 2). Of particular interest here is the complaint filed by Complainant to the EEOC. The complaint states in part:

> "On 10/23/92 and 12/31/92 I received three-day suspensions. On 1/13/93 I was reassigned from my Radiation Protection Technician's position to the tool room...Ed Cargill, White, Director of Radiological Programs, and Wayne Hardy, White, Radiation Protection Supervisor, told me that I received the suspensions for violating procedures. Nelson Carver, White, Employee Relations Director, informed me that I was reassigned due to unsatisfactory performance...I believe that I have been discriminated against because of my race, Black." (EX-87, p. 3).

This complaint was filed on January 14, 1993 and the Determination was issued on December 30, 1993. Complainant's ERA complaint was filed on June 21, 1993. In the ERA complaint, Complainant alleges that the reason he was transferred out of Radiation Protection was because of his involvement with the RDR on the ladder incident. I find Complainant's complaint to the EEOC, which was previous to his present complaint, to be significant. As stated before, Complainant must raise the inference that the protected activity was the likely reason for the adverse action. Here it seems that Complainant had multiple theories on why he had been transferred. However, his initial theory was that he had been discriminated against because of his race, not because of any "protected activity." Thus, I have great difficulty in trying to infer that Complainant's filing of the RDR was the reason for his transfer when Complainant himself first alleged discrimination based on race and held to this allegation for five months. Eventually, Complainant later completely changed his story, stating that he had been discriminated against because of his RDR on the ladder incident. In considering that Complainant also sought arbitration with his union, it appears to me that Complainant was in essence, "covering all his bases" in his efforts to regain his higher paying position. Also, in each of the three separate actions, Complainant put forth three different arguments as to why he should be reinstated to his former position. For the EEOC

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action, Complainant asserted discrimination based on race. For the arbitration action, Complainant asserted contract law and did not mention discrimination of any sort. Finally, for the present action Complainant asserts discrimination based on protected activity and wishes this Court to infer as much. This I cannot do.

I find that Complainant has not established his prima facie case and Respondent has produced evidence that Complainant was subjected to adverse action for legitimate, nondiscriminatory reasons. Accordingly, this complaint must be dismissed.

RECOMMENDED ORDER

The complaint of discrimination filed by A.D. Paynes pursuant to Section 211 of the Energy Reorganization Act, as amended, is DISMISSED.

RICHARD D. MILLS
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).

[ENDNOTES]

[1] Testimony indicates that the ladder incident would have been documented as an RDR or a CR by either Mr. Heath or Mr. Pendergraft had Complainant not written the RDR on the incident. This, however, is inconsequential to this part of the discussion as the fact remains that it was Complainant who ultimately did submit the RDR.